85-1269

No.

Supreme Court, U.S.
FILED
JAN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1985

BARRY HOWARD and ANNARINA HOWARD,
Petitioners.

v.

DEERBROOK STATE BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALLEN KANTER
KANTER & MATTENSON, LTD.
One North LaSalle Street
Suite 1400
Chicago, Illinois 60602
(312) 368-1400

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law under the Fifth Amendment to the United States Constitution by the judgment striking petitioners' pleadings and entering judgment against petitioners without trial on the merits or presence of retained counsel.

2. Whether the United States Court of Appeals abused its discretion by affirming the judgment, which denied petitioners a trial on the merits.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2-4
Statement	4-6
Reasons for granting the petition	7-13
Conclusion	13
Appendix A	5,6,7,9,12,A1
Appendix B	6,7,9,B1-B4
Appendix C	5,8,9,C1-C2
Appendix D	6,9,D1-D2
Appendix E	5,12,E1-E5
Appendix F	F1-F3

TABLE OF AUTHORITIES

CASES:

Armstrong v. *Manzo*, 380 U.S. 545	8
Boazman v. *Economics Laboratory, Inc.*, 537 F.2d 210	11
Deitchman v. *E.R. Squibb & Sons, Inc.* 740 F.2d 556	10
Grannis v. *Ordean*, 234 U.S. 385	8
Jackson v. *Washington Monthly Co.*, 569 F.2d 119	10
Link v. *Wabash Railroad Company*, 370 U.S. 626	10,12
Powell v. *Alabama*, 287 U.S. 45	8
Pulliam v. *Pulliam*, 478 F.2d 935	11
Societe Internationale v. *Rogers*, 357 U.S. 197	9

CONSTITUTION, STATUTES, AND REGULATIONS:

United States Constitution:

Fifth Amendment 2,7,9,12
Fed. Rules Civ. Proc. rule 41 (b) 2,9,11
Fed. Rules Civ. Proc. rule 60 (b) 3,6,11
Bankruptcy Rules rule 8001 ..... App. F1-F3
Bankruptcy Rules rule 9024 4,6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

BARRY HOWARD and ANNARINA HOWARD,

Petitioners,

v.

DEERBROOK STATE BANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Barry Howard and Annarina Howard Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1-2) is not reported. The opinion of the district court (App. B, infra, 1-5) is not reported. The orders of the United States Bankruptcy Court for the Northern District of Illinois (App. C, infra, 1-2 and App. D, infra, 1-3) are not reported.

JURISDICTION

The judgment of the court of appeals (App. A, infra, 1-2) was entered on October 25, 1985. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction of the Bankruptcy Court was based upon 11 U.S.C. 301 et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fed. Rules Civ. Proc. rule 41(b) provides:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the

facts may then determine them and render judgment against the plaintiff or may decline evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

3. Fed. Rules Civ. Proc. rule 60(b) provides:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding as entered or taken. a motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to

grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

4. Bankruptcy Rules rule 8001 provides:

See App. F., infra, 1-2

5. Bankruptcy Rules rule 9024 provides:

Rule 60 F.R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by §727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or §1330.

STATEMENT

This action arose upon the December, 1982 filing by respondent of an adversary complaint against petitioners in pending bankruptcy proceedings voluntarily initiated by petitioners. The adversary complaint sought to obtain leave of the bankruptcy court to initiate proceedings in the courts of the State of Illinois to evict petitioners from their residence. The petitioners filed an answer and counterclaim seeking certain relief, including an order compelling respondent to specifically perform an agreement to renew a loan obligation; to enjoin respondent from transferring the beneficial interest in the land trust,

which held legal title to the petitioners' residence; and for an award of damages.

Thereafter, on June 20, 1983, Robert E. Gordon substituted in the above proceedings as attorney of record for the petitioners and on June 23, 1983 the parties proceeded to trial. At the close of the partial trial proceedings held on June 23, 1983, the bankruptcy court ordered that a pretrial order be filed within 14 days and stated that the case was to be continued to July 12, 1983 at 11:00 A.M. for pretrial. On July 12, 1983 there was confusion as to whether or not the case was set that day for trial or for pretrial hearing (App. A, infra, 2).

On July 12, 1983 the petitioners' new attorney, Robert Gordon, was unable to appear before the bankruptcy court for the scheduled pretrial due to another trial, which was held at the same time in DuPage County, Illinois (App. E, infra, 1 and 4). However, an attorney from Robert Gordon's office appeared at that time and informed the bankruptcy court of this fact. At 2:00 P.M. on July 12, 1983 the bankruptcy court, believing that the case was set for trial that day, informed the representatives of both parties that the petitioners' pleadings were to be stricken and judgment would be entered for the respondent without hearing. At this time Mr. Gordon had still been unable to appear due to the trial in DuPage County, Illinois.

On July 13, 1983 a judgment order (App. C, infra, 1-2) was entered by the bankruptcy court striking all pleadings of petitioner; ordering disbursement to respondent of funds contained in an escrow; and lifting the stay in the bankruptcy proceedings to allow respondent to initiate state court eviction proceedings against petitioners.

Petitioners then filed a motion to vacate the order of July 13, 1983 pursuant to the Fed. Rules Civ. Proc. rule 60(b), which were applicable to bankruptcy proceedings under Rule 9024 of the rules of bankruptcy procedure. This motion to vacate was denied by the bankruptcy court in its order of September 7, 1983 (App. D, infra, 1-2). The petitioners then appealed to the United States District Court for the Northern District of Illinois pursuant to Rule 8001 of the rules of bankruptcy procedure.

On October 22, 1984 the United States District Court for the Northern District of Illinois affirmed the order of the bankruptcy court dated September 7, 1983, denying petitioners' motion to vacate the order of July 13, 1983 (App. B, infra, 1-4).

Thereafter, an appeal of the order of the United States District Court was taken to the United States Court of Appeals for the Seventh Circuit by petitioners. On October 25, 1985, in an unpublished order, the United States Court of Appeals entered its order affirming the decision of the District Court (App. A, infra, 1-2).

It is from this order that petitioners seek a grant from this Court of their petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

1. This case raises critical questions concerning the rights of civil litigants under the due process clause of the United States Constitution to a full and fair hearing on the merits of an action and to have retained counsel present at proceedings in which their interests will be adversely affected.

The court of appeals has, by affirming the judgments of the United States District Court and the Bankruptcy Court, held that it was not an abuse of discretion for the Bankruptcy Court to strike and dismiss petitioners' pleadings and enter judgment against petitioners without a trial on the merits and without the presence of counsel obtained by petitioners. Such affirmance was made even though there existed confusion as to whether the case had been set for trial or a pretrial hearing (App. A, infra, 2); petitioners' counsel was detained by another trial at the scheduled time (App. A, infra, 2 and App. E, infra, 1 and 4); petitioners' counsel was only recently retained (App. B, infra, 1-2) and there was no showing of any personal negligence or misbehavior on the part of petitioners. As a result, the petitioners have been penalized by the Bankruptcy Court's order and are threatened with the loss of their home, without having been allowed to present their case in full to the trier of fact.

Under the Fifth Amendment of the United States Constitution, no person can be deprived of his property without due process of law. U.S. Const. Amend. V. With regard to the due process rights of individuals under the constitution, this court has clearly indicated that the Fifth Amendment implies the right to retain counsel in

civil litigation. *Powell* v. *Alabama*, 287 U.S. 45, at 69 (1932). There is also a right to have a full and fair hearing under the Fifth Amendment to the Constitution. The court has held that "the fundamental requisite of due process of law is the opportunity to be heard." *Granis* v. *Ordean*, 234 U.S. 385, at 394 (1914).

This opportunity to be heard requires, according to the holding of the court, that a hearing must be at a "meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, at 552 (1965).

In the case at bar, the petitioners have been denied their due process rights to a full and fair hearing on the merits at a meaningful time and in a meaningful manner. They have also been denied their right to counsel. First, the judgment of July 13, 1983 (App. C, infra, 1-2) was made without the presence of counsel retained by petitioners. This denied the petitioners their right to have the advise and assistance of counsel at a hearing which definitely and adversely affected their interests. This occurred even though the court was informed that said counsel was detained on a trial in another matter. In addition, this was done at what counsel for petitioners reasonably believed to be a pretrial conference and at a time after the trial of the action had been partially completed on June 23, 1983. Furthermore, there was no showing of any improper or contumatious behavior on the part of petitioners.

By striking petitioners' pleadings and entering judgment against them, the court denied them any opportunity to present their defenses and counterclaim. Thus, it is apparent from the foregoing, that petitioners were not given any hearing at all on the merits and were denied the right to have the advice and assistance of retained counsel pre-

sent at a hearing wherein a judgment adversely affecting the petitioners' interests was entered. Petitioners therefore contend that the affirmance of the Bankruptcy Court's judgment constitutes an improper sanctioning of an order, which was an unjust and unusual departure from ordinary court proceedings.

2. The petitioners respectfully submit that the United States Court of Appeals abused its discretion when it affirmed the decision of the United States District Court for the Northern District of Illinois (App. B, infra, 1-4) and thus the decision of the Bankruptcy Court (App. C. infra, 1-2 and App. D, infra, 1-2).

It should first be noted that the bankruptcy court's order of September 13, 1983 did not indicate whether or not its refusal to vacate was premised on Fed. Rules Civ. Proc. Rule 41(b) or the court's inherent authority. The United States Court of Appeals assumed, in its affirming opinion, (App. A. infra, 2) that the decision of the bankruptcy court was based on its inherent authority to control its docket. Whether the decision was based on such inherent authority or upon Fed. Civ. Proc. Rule 41(b), the power of the lower court to strike petitioners' pleadings and enter a judgment without hearing was limited by the Fifth Amendment of the United States Constitution. U.S. Const. Amend. V. This court has previously held that ". . . there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Society Internationale* v. *Rogers*, 357 U.S. 197, at 209 (1958).

In a case such as this, the appropriate inquiry in determining whether there has been an abuse of discretion in reviewing a case is "not how the reviewing judges would have ruled if they had been considering the case in the first place, but rather, whether any reasonable person could agree with the district court." *Deitchman* v. *E.R. Squibb* v. *Sons, Inc.*, 740 F.2d 556, at 563 (7th Cir. 1984).

In *Link* v. *Wabash Railroad Company*, 370, U.S. 626 at 633-634 (1962), the court held that a court may, in exercising its discretion hold a client responsible for the conduct of his counsel. However, in *Link* v. *Wabash Railroad Company*, supra, and subsequent cases, the courts have made it clear that such dismissals are appropriate when the attorney has "taken a course of protracted neglect". *Jackson* v. *Washington Monthly Co.*, 569 F.2d 119, at 121 (D.C. Cir. 1977). The court in *Jackson* v. *Washington Monthly Co.*, supra, held that:

> Trial court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort to lesser sanctions. And while appellate review is limited by the binding authority of Link to whether judicial discretion has been abused, a sound discretion hardly comprehends a pointless exaction of retribution. Dismissals for conduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free. That curious treatment strikes us as both anomalous and self defeating. When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of appropriate action against the lawyer as the medium for vindication of the judicial process and protection of the citizenry from future imposition. Jackson, supra, at 123.

In the case at bar, this was the first violation by new counsel retained by petitioners. It occurred after the trial had already commenced on June 23, 1983. Accordingly, it is respectfully submitted that dismissal of petitioners' pleadings and entry of judgment against them was an abuse of discretion, imposing far too grave a sanction upon petitioners, when sanctions against counsel for petitioners could have been imposed.

The case of *Boazman* v. *Economics Laboratory, Inc.*, 537 F.2d 210 (5th Cir. 1976) involved a dismissal of a plaintiff's case for want of prosecution. The court in this case reversed the trial court's dismissal because there was "none of the contumacious indifference to the court of the kind we generally regard as requisite to the use of this severe sanction." *Boazman* v. *Economics Laboratory, Inc.*, supra, at 213.

In reviewing the denial of a motion to vacate an order of dismissal pursuant to Fed. Rules Civ. Proc. rule 60(b) another court stated that "Since a resolution on the merits is preferable to a judgment by default, a court should liberally allow relief under this provision. Rule 60 is meant as a corrective remedy, mitigating the harsh impact of calendar rules when a litigant's action is dismissed as a result of counsel's neglect." *Pulliam* v. *Pulliam*, 478 F.2d 935, at 936 (D.C. Cir. 1973).

Whether dealing with a decision based on the court's inherent authority or upon Fed. Rule Civ. Proc. rule 41(b), the standards should be the same. In the case at bar, we are dealing with the inherent authority of the court. Here, the petitioners have been gravely penalized by the failure of their counsel to attend what he believed was a pre-trial conference, due to another trial. The United States Court

of Appeals, in affirming the decisions of the lower courts apparently relied on a "history of numerous continuances" and "failures to comply with use and occupancy orders" and upon the fact that "Deerbrook's complaint had been on the bankruptcy court's docket for 20 months." (App. A, infra, 2). However, this decision apparently fails to consider several mitigating factors. First, the case had already been partially tried on June 23, 1983 and there was no showing of prejudice to respondents. Secondly, this particular attorney had only recently been obtained by the petitioners. Next, there was no showing of a protracted course of neglect by petitioners' new counsel or by the petitioners themselves. In addition, this was but a single violation of the court's order by the new attorney for the petitioners. Surely, the petitioners should not have been so penalized for the conduct of their counsel in this particular instance. There was no showing of any contumacious behavior or neglect on the part of petitioners. To the contrary, the petitioners had already engaged in trial proceedings on June 23, 1983 and were ready to proceed with the completion of the trial. (App. E, infra, 1). Affirmance of the bankruptcy court's order striking petitioners' pleadings and entering judgment against them was an abuse of discretion under the particular facts and circumstances of this case. It was far too harsh, especially when other sanctions were available to the bankruptcy court, which could have been rendered either petitioners or their counsel. The petitioners respectfully submit that the judgments of the lower courts were contrary to the holding of *Link* v. *Wabash Railroad Company, Inc.*, 370 U.S. 626 (1962) and exceeded the limitations imposed upon them by the due process clause of the Fifth Amendment to the United States Constitution, U.S. Const. Amend. V.

The petitioners do not argue that no sanctions should have been imposed, but only that fair sanctions, which would not unfairly penalize them, should have been entered by the bankruptcy court and the petitioners given a full and fair hearing on the merits.

CONCLUSION

For the reasons set forth hereinabove, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALLEN KANTER
Attorney for Petitioners

January 23, 1986

APPENDIX

A. October 25, 1985 Order of the United States Court of Appeals for the Seventh Circuit A1-A-3

B. October 22, 1984 Memorandum of Opinion and Order of the United States District Court—Northern District of Illinois, Eastern Division B1-B4

C. July 13, 1983 Order of the Bankruptcy Court for the Northern District of Illinois, Eastern Division C1-C2

D. September 7, 1983 Order of the Bankruptcy Court for the Northern District of Illinois, Eastern Division D1-D2

E. Petition to Vacate Order of July 13, 1983 filed by petitioners in the Bankruptcy Court, with attached affidavit E1-E5

F. Text of Bankruptcy Rules rule 8001 ..... F1-F3

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

Argued September 19, 1985

October 25, 1985

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

BARRY HOWARD and ANNARINA HOWARD,
f/d/b/a HOWARD OFFICE MACHINES,

Debtors,

In re: Deerbrook State Bank,

Plaintiff, Counter-Defendant, Appellee,

No. 84-2970 vs.

BARRY HOWARD and ANNARINA HOWARD,

Defendants, Counter-Plaintiffs, Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 83-C-7734
John A. Nordberg, Judge.

ORDER

On July 13, 1983 the bankruptcy court for the Northern District of Illinois entered an order permitting appellee Deerbrook State Bank ("Deerbrook") to bring state court eviction proceedings against the appellants Barry and Anna Howard ("the Howards") and dismissing appellants' counterclaim. A motion to vacate that order made pursuant to Fed. Civ.P. 60(b) (applicable to bankruptcy proceedings by Rule 9024 of the Rules of Bankruptcy Procedure) was denied on August 8, 1983. The denial of the Rule 60(b) motion was affirmed by the district court on October 22, 1984. The Howards appeal. We affirm.

As a general matter, federal courts have liberally set aside dismissal orders upon a proper showing of "mistake' inadvertence, surprise, or excusable neglect." *Beshear* v. *Weinzapfel*, 474 F.2d 127, 131 (7th Cir. 1973); Fed. R.Civ.P. 60(b). The trial court, however, has broad discretion in denying Rule 60(b) motions and will not be reversed in the absence of an abuse of discretion. *Id.* at 130. This discretion rests either upon Rule 41(b), Fed.R.Civ. P., or upon the inherent power of courts to facilitate the orderly and expeditious disposition of cases. *Link* v. *Wabash RR*, 370 U.S. 26, 630-31 (1962). In denying appellants' Rule 60(b) motion the bankruptcy court did not rely expressly on Rule 41(b). We shall therefore assume that its disposition of this case was effectuated by virtue of its inherent authority to control its own docket. We note, however, that we would affirm even if the bankruptcy court had explicitly relied on Rule 41(b).

In the order denying the Howards' motion, the bankruptcy court noted that this case has a history of numerous continuances and failures to comply with use and occupancy orders. On August 8, 1983 Deerbrook's complaint had been on the bankruptcy court's docket for twenty months. The bankruptcy judge was familiar with the facts, circumstances, and erratic history of this litigation. His determination that dismissal was appropriate will not be disturbed absent a showing of mistake or

excusable neglect sufficient to establish an abuse of discretion. *Beshear* v. *Weinzapfel*, 474 F.2d at 130. Appellants have not made such a showing.

Counsel for the Howards was delayed at an unrelated trial. Such a delay, however, was eminently foreseeable. Counsel should have taken precautions to ensure that an attorney would be available and able to proceed to trial in the event he was delayed. Counsel should have contacted the bankruptcy judge personally instead of relying on associates from his office to communicate his situation. We view with skepticism counsel's *ex post facto* statements at oral argument that an attorney capable of going to trial was present on July 12, 1983 and note that there is no such indication in the record.

Appellants contend that the proceeding scheduled for July 12, 1983 was in fact a pretrial conference and not a trial. Even if true, we are not convinced this fact, under the circumstances of this case, would have been significant. We point out that the bankruptcy judge clearly believed he had set the case for trial on July 12 and not for a pretrial proceeding. Moreover, even if the case had been set for pretrial, that fact alone would not warrant reversal. In *Link*, the Supreme Court held that a failure to attend a pretrial conference, in the context of all the circumstances of the case known to the trial court including earlier delays, justified a dismissal with prejudice on the court's own motion without notice or hearing. 370 U.S. at 624. Appellants have failed to distinguish their situation from that at issue in *Link*.

Dismissal for their attorney's misconduct is a harsh sanction to impose on appellants. But the Howards voluntarily chose this attorney as their representative in this action and "cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation." *Id.*

Accordingly, the decision of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARRY HOWARD and ANNARINA HOWARD,
f/d/b/a HOWARD OFFICE MACHINES,

Debtors,

IN RE: DEERBROOK STATE BANK,
an Illinois Banking Corp.,

Plaintiff, Counter-Defendant and Appellee,

v.

BARRY HOWARD and ANNARINA HOWARD,

Defendants, Counter,Plaintiffs and Appellants.

MEMORANDUM OPINION AND ORDER

This matter before the court on appeal from the order of the Bankruptcy Court dated September 7, 1983, denying the debtor's motion to vacate the court's order of July 13, 1983. In the July 13, 1983 order, the court had dismissed the debtor's counterclaim, and permitted the Deerbrook Bank to proceed in state court eviction proceedings against the debtor. On August 8, 1983, the debtors brought an emergency motion to vacate this order. It is the order denying this motion to vacate, entered on September 7, 1983, from which the debtors appeal.

Throughout the course of the adversary proceedings in this case, the Bankruptcy Court had granted numerous continuances to the debtors over the course of the 19 months that the proceeding was pending. The case was finally set for trial on June 23, 1983. However, on the eve of trial, counsel for the debtors withdrew from the case and new counsel requested to appeal on the debtors' behalf. The court permitted the new attorney to represent the debtors, but stated that it would hold to the trial sched-

ule already set. The case proceeded to trial on June 23, 1983 as scheduled. Apparently in response to a request from the debtors' counsel, the court agreed to permit the debtors' counsel additional time to prepare for trial. The court therefore bifurcated the trial of the case, and allowed counsel for appellant ten days to conduct further discovery, file any clarified pleadings on behalf of the debtors, and prepare a new pretrial order for submission to the court. The matter was continued to July 12, 1983 at 11:00 a.m.

At 11:00 a.m. on July 12, 1983, counsel for the debtors failed to appear. The attorney was apparently appearing before a court in Wheaton at the time on another matter and instead sent a clerk to court. The Bankruptcy Court scheduled a hearing for later that day at 2:00 p.m., and indicated that there was a very serious possibility of judgment being entered on the record against the debtors at 2:00 p.m. if the debtors' counsel did not appear and provide the court with the new pretrial order.

At 2:00 p.m., attorney Gilbert Gordon, brother of the debtors' attorney, appeared before the Bankruptcy Court, but indicated that he had no knowledge of the case, no court file, and could not comply with the pretrial order or otherwise handle the case in any manner. The Bankruptcy Court then entered an order dismissing the counter complaint of the appellants, and allowing the Deerbrook Bank to proceed in the state court in an eviction proceeding. The Bankruptcy Judge signed a written draft order to this effect the next day, on July 13, 1983.

Twenty-seven days later, on August 8, 1983, the debtors filed a motion to vacate the order of July 13, 1983. In the motion to vacate, the debtors' counsel stated that he had been detained in a Wheaton Court the day of the trial. The Bankruptcy Court denied the debtors' motion, and on September 7, 1983, issued a written order stating its reasons for denying the motion. In its order, the court stated that it is the policy of the Court to exercise liberality in vacating orders within thirty days when the order

is the result of an ex parte hearing or a default. The court also stated, however, that it is equally important for the court to exercise its discretion to permit the orderly disposition of pending cases. The court noted that this case had a history of continuances at the request of the debtors, and of a failure of the debtors to comply with use and occupancy orders of the court and the pretrial order required by the court. The court stated that although the debtors had changed counsel on the eve of trial, the court permitted the debtors' new counsel time to prepare for trial. The court noted that during the period of delay, the court received no amended pleadings, no pretrial order, and no request for a continuance of the hearing, which had been set on a date agreeable to all counsel. The court finally noted that, although it was mindful of the burden on an attorney when determining the priority between two cases set for the same time, the substitution of counsel was permitted in this case only on the condition that the matter would proceed to trial without delay. The court therefore concluded that there was nothing in the record to justify the failure of the attorney to appear.

The debtors now appeal to this court from the order of September 7, 1983, denying their motion to vacate. The debtors argue that the Bankruptcy Court should have granted their motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure, applicable to bankruptcy proceedings through Rule 9024 of the Rules of Bankruptcy Procedure. The debtor asserts that the Bankruptcy Court made a mistake in stating that the matter had been set for trial on July 12, 1983. The debtor contends that the case was merely set for pretrial and that dismissal for failure to appear at a pretrial is too sever a sanction and constitutes an abuse of discretion by the Bankruptcy Judge. In support of this argument, the debtors merely state that the "Records bears out" that the case was set for pretrial, not trial. However, the debtors never state how the record bears this out, and never point to any part of the record to support this contention. To the contrary, the record reflects that the judge explicitly stated

in his orders of July 13, 1983 and September 7, 1983, that the matter had been set over for trial on July 12, 1983, not merely for a pretrial. After careful review of the record, the court discovered that a minute order of June 24, 1983 stated in one place that a pretrial was set for July 12, 1983. However, on that same minute order, the Bankruptcy Judge wrote in his own handwriting that trial was continued to July 12. This notation alone should have alerted the debtors that the matter was set for trial.

In any event, the court finds that, whether the case had been set for pretrial or trial, the court acted properly in denying the motion to vacate. It is clear from the record that the Bankruptcy Court had granted numerous continuances to the debtors, that it permitted substitution of counsel at the last minute only on the condition that trial not be delayed, that the court then permitted debtors' new counsel ten more days to prepare and file new materials with the court, that the debtors' counsel did not file any of the new materials, and did not appear at the hearing set at the close of the time period of the extention granted. In light of all of these circumstances, after reviewing this matter *de novo*, the court finds that the Bankruptcy Court took appropriate action in the circumstances to secure the orderly disposition of cases on its docket, in entering both the orders of July 13, 1983 and September 7, 1983.

Accordingly, the court affirms the order of the Bankruptcy Court entered September 7, 1983, denying the motion of the debtors to vacate the order of July 13, 1983.

ENTER:
/s/ John A. Nordberg
Judge John A. Nordberg
United States District Court

Dated: October 22, 1984

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

IN RE: BARRY HOWARD and ANNARINA HOWARD f/d/b/a HOWARD OFFICE MACHINES,

Debtors,

and

DEERBROOK BANK, an Illinois Banking Corporation,

Plaintiff,

v.

BARRY HOWARD and ANNARINA HOWARD, f/d/b/a HOWARD OFFICE MACHINES,

Defendants.

Case No. 81 B 12399

Adversary No. 81 A 3969

ORDER

This matter coming on to be heard as a set case at 11:00 a.m. and having been set over to the 2:00 p.m. call of this Court, with the trial of this case having heretofore commenced and based upon the pretrial order and Exhibits 1 through 17, which the Court has admitted into evidence and granted leave of DEERBROOK STATE BANK to withdraw, and with the Court having directed interim compliance and upon the Motion of DEERBROOK STATE BANK and with the Court being fully advised in the premises,

IT IS ORDERED:

1. The answer and counter-complaint of BARRY HOWARD and ANNARINA HOWARD are hereby stricken.

2. That Phillip M. Migdal disburse to DEERBROOK STATE BANK the sum of $8,948.96 plus interest. Said

funds being held in a use and occupancy escrow and found due and owing DEERBROOK STATE BANK.

3. That judgment be entered in favor of DEERBROOK STATE BANK and against BARRY HOWARD and ANNARINA HOWARD to allow the stay heretofore existing against filing an eviction proceeding against BARRY HOWARD and ANNARINA HOWARD to be lifted.

4. DEERBROOK STATE BANK is granted leave to file a forcible entry and detainer suit in the Circuit Court of Cook County, Illinois against BARRY HOWARD and ANNARINA HOWARD relative to the premises located at 1685 Holly Avenue, Northbrook, Illinois.

5. That BARRY HOWARD and ANNARINA HOWARD are barred from proceeding in any other court and certainly from proceeding in this Court relative to any of the matters raised in the counter-complaint filed by them or from raising any of said matters by way of defense.

Dated: July 13, 1983

ENTER:

Frederick J. Hertz
Judge

Leon C. Wexler & Phillip M. Migdal
Attorney for Deerbrook Bank
111 W. Washington - 1220
Chicago, Illinois 60602
236-3399

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

IN RE: BARRY HOWARD and ANNARINA HOWARD, f/d/b/a HOWARD OFFICE MACHINES,

Debtors,

and

DEERBROOK BANK, an Illinois Banking Corporation,

Plaintiff,

v.

BARRY HOWARD and ANNARINA HOWARD, f/d/b/a HOWARD OFFICE MACHINES,

Defendants.

No. 81 B 12399

No. 81 A 3969

ORDER

This matter coming on to be heard on the Motion of the Debtors to vacate the order formally entered on July 13, 1983; with counsel for both parties before the Court and with the Court hearing extensive argument concerning the history of this case and considering that, along with all pleadings, motions, responses and evidence heretofore presented,

THE COURT FINDS:

That it is the policy of this Court and certainly of the Appellate Tribunals to exercise liberality in vacating orders within thirty days when the order is the result of an exparte hearing or a default type hearing.

However, in the instant case, an equally important requirement in the exercise of this Court's discretion is the administration of an orderly disposition of pending proceedings. This case has a history of numerous continuances at the request of the debtors and the failure of the debtors

to comply with use and occupancy orders of this Court and the pretrial order required by this Court.

The debtors changed attorneys on the eve of trial and this Court commenced trial and took evidence in this cause. This Court then bifurcated the hearing of this cause to allow the debtors further discovery; the opportunity to clarify pleadings and time to prepare an appropriate pretrial order. During the period of delay, this Court received no amended pleadings; no pretrial order and no request for a continuance of the hearing, which was set on a date agreeable to all counsel.

Accordingly, the failure of the debtors or the debtors' counsel to appear at the scheduled hearing before this Court or to appear in the afternoon, at the further extension granted by this Court with a pretrial order or other wise ready for trial resulted in the Order heretofore entered.

This Court is not unmindful of the burden upon the practitioner to be required to determine priorities between two cases which might be set for the same time. However, when substitution was allowed in this case, it was with the proviso that this matter would proceed without further delays, and there is nothing in the record before this Court to justify the failure of the new attorney to appear at the time he agreed to appear.

Accordingly, IT IS ORDERED:
That the Motion of the Debtors is denied.

Date: 9-7-83

ENTER:

Frederick J. Hertz
JUDGE

Leon C. Wexler
Attorney for Deerbrook Bank
111 W. Washington - 1220
Chicago, Illinois 60602
236-3399
Attorney No. 3724

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BARRY HOWARD and ANNARINA HOWARD,
f/d/b/a HOWARD OFFICE MACHINES
In Re: DEERBROOK STATE BANK,
an Illinois Banking Corp.,

Plaintiff

v.

BARRY HOWARD and ANNARINA HOWARD,

Defendants

No. 81 B 12399

81 A 3969

PETITION

NOW COME your petitioners, BARRY HOWARD and ANNARINA HOWARD, by their attorneys, GORDON & GORDON, LTD., and being first duly sworn, file herewith their Petition and represent unto this Honorable Court as follows:

1. That the above captioned matter was set for pretrial conference on July 12, 1983 at 11:00 a.m.

2. That the attorney handling the file is Robert E. Gordon who was handling a legal matter in Wheaton in the early morning and the matter took the entire day.

3. That an *attorney* from the office of defendant's counsel appeared before the judge and requested a one day continuance and the judge advised that the case would proceed to *trial at 2:00 p.m.*, even though the matter was set for pretrial conference only.

4. That the debtors are ready and able to proceed with the trial which was commenced and are entitled to have their day in court.

5. That an order was supposedly entered by this Court without counsel for the defendant being given a copy of said order, or being told what date the order would be presented to the Court.

6. That neither the debtor nor their attorney were negligent in the handling of this matter and are ready and able to have a pretrial conference and proceed to trial on this matter, but requested a pretrial conference upon the suggestion of the Court, so that they can file their Amended Complaint and Pretrial Memorandum.

7. That it would be a gross injustice for an order to be entered for the defendants to give up possession of the home that they lived in and lost through the fraud of the plaintiff herein.

8. That it is on information and belief that the debtor believes an order has been entered in the above captioned matter.

WHEREFORE, the defendants pray that the order heretofore entered on July 12, 1983, or whenever thereafter, be vacated, set aside and held for naught.

/s/ Robert E. Gordon
ROBERT E. GORDON

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

ROBERT E. GORDON, being first duly sworn, on oath deposes and says that he is the attorney for the defendants in this cause; that he has read the above and foregoing Petition by him subscribed; that he knows the contents thereof; and that the same is true in substance and in fact.

/s/ Robert E. Gordon
ROBERT E. GORDON

SUBSCRIBED and SWORN to
before me this 3d day of
August, 1983.

_____

Notary Public

GORDON & GORDON, LTD.
Attorneys for Defendants
180 North LaSalle Street
Chicago, Il. 60601
332-2490

PROOF OF SERVICE

I, the undersigned, hereby state that on August 3, 1983, at the hour of ——p.m., I served a copy of the within Notice, Motion and Petition upon the attorneys to whom it is directed.

_____

SUBSCRIBED and SWORN to
before me this 3d day of
August, 1983.

_____

Notary Public

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: BARRY HOWARD and ANNARINA HOWARD f/d/b/a HOWARD OFFICE MACHINES,

Debtors

and

DEERBROOK BANK, an Illinois Banking Corporation,

Plaintiff

vs.

BARRY HOWARD and ANNARINA HOWARD, f/d/b/a HOWARD OFFICE MACHINES,

Defendants

CASE NO. 81 B 12399

ADVERSARY NO. 81 A 3969

AFFIDAVIT

NOW COMES your Affiant, GILBERT W. GORDON, and being first duly sworn upon oath, represents and shows as follows:

(1) That in the afternoon of July 12, 1983, he appeared at approximately 2:00 P.M. in the chambers of Judge Frederick J. Hertz, in regard to the above captioned matter.

(2) That he is an Attorney with the Law Firm of GORDON & GORDON, Ltd. and that his brother, ROBERT E. GORDON, was detained on Trial in a matter in Wheaton, Illinois and that the Court had previously been advised of that fact earlier in the day.

(3) That your Affiant tendered to the Court an Affidavit to be filed pertaining to ROBERT E. GORDON'S engagement in Wheaton, which is attached as EXHIBIT "A" to this Brief, and has been filed and should be part of the Record in this case.

(4) That before your Affiant had any opportunity to make any statements to the Court, the Court stated that Judgment had been entered for DEERBROOK and that a draft of the Order would be submitted to GORDON prior to its entry.

(5) That no Court Reporter was present nor was there any Hearing and that when your Affiant arrived at the Judge's chambers, Attorney WEXLER and another gentleman in the Court were already present.

Your Affiant further sayeth not.

/s/ Gilbert W. Gordon
GILBERT W. GORDON

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

GILBERT W. GORDON, being first duly sworn upon oath, states that he has read the above and foregoing AFFIDAVIT by him subscribed and that said document is true and correct.

/s/ Gilbert W. Gordon
GILBERT W. GORDON

SUBSCRIBED and SWORN to before me
this 26th day of January, 1984.

_____(SEAL)
NOTARY PUBLIC

APPENDIX F

Text of Bankruptcy
Rules rule 8001

MANNER OF TAKING APPEAL; VOLUNTARY DISMISSAL; EFFECT OF APPEAL TO COURT OF APPEALS

(a) Appeal as of Right; How Taken. An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk of the bankruptcy court within the time allowed by Rule 8002. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to Official Form No. 35, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk of the bankruptcy court to comply promptly with Rule 8004.

(b) Appeal by Leave; How Taken. An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U.S.C. §1334(b) or §1482(b) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

(c) Voluntary Dismissal.

(1) Before Docketing. If an appeal has not been docketed, the appeal may be dismissed by the bank-

ruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(2) After Docketing. If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court or bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

(d) Effect of Taking a Direct Appeal to the Court of Appeals.

(1) Dismissal of Pending Appeal to the District Court or the Bankruptcy Appellate Panel. On the filing of a notice of a direct appeal by agreement of the parties to the court of appeals under 28 U.S.C. §1293(b), the clerk of the bankruptcy court shall enter an order vacating any prior notice of appeal to the district court or bankruptcy appellate panel from the same judgment, order, or decree of the bankruptcy court and, if the appeal to the district court or bankruptcy appellate panel has not been docketed, the clerk of the bankruptcy court shall enter an order dismissing the appeal. If the appeal to the district court or bankruptcy appellate panel has been docketed, the clerk of the bankruptcy court shall forward to the clerk of the district court or the clerk of the bankruptcy appellate panel a copy of the order vacating the notice of appeal and on receipt thereof the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal.

(2) Dismissal of Subsequent Appeal to the District Court or the Bankruptcy Appellate Panel. If a notice of direct appeal under 28 U.S.C. §1293(b)

is filed and thereafter a notice of appeal to the district court or bankruptcy appellate panel from the same judgment, order, or decree is filed, the clerk of the bankruptcy court shall enter an order dismissing the appeal to the district court or the bankruptcy appellate panel.

(3) Appeal After Dismissal of Direct Appeal by Court of Appeals. If the direct appeal under 28 U.S.C. §1293(b) is dismissed by the court of appeals on the ground that the judgment, order, or decree appealed from is not final, the appellant or cross appellant may, within 10 days of entry of the order of the dismissal in the court of appeals, file a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.